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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL NEIL HURD, Defendant and Appellant.	C068665 (Super. Ct. No. NCR80429, NCR81370)

Previously granted Proposition 36 probation, defendant Daniel Neil Hurd's probation was revoked after pleading guilty to transporting methamphetamine. The trial court denied defendant's request for drug court or further Proposition 36 probation; he was sentenced to an aggregate term of four years eight months in state prison. Defendant appeals his sentence. Finding no error, we affirm the judgment.

FACTS AND PROCEEDINGS

The facts underlying defendant's convictions are not relevant to the issue raised on appeal. Accordingly, we do not include them in our opinion.

In November 2010, defendant was charged in Tehama County Superior Court, case No. NCR80429 (case No. 80429) with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and possessing drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)). It was further alleged that defendant was previously convicted of a strike offense (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

In December 2010, defendant pleaded guilty to possession of a controlled substance. In exchange for his plea, the People agreed to dismiss the remaining charge and enhancement allegation and place defendant on Proposition 36 probation. Defendant was sentenced in accordance with his plea.

On March 24, 2011, a petition to revoke defendant's probation was filed. The petition alleged that on March 8, 2011, defendant left his "residential treatment program in Redding without permission"; on March 14, 2011, was "terminated from the Proposition 36 treatment program"; and on March 16, 2011, was found in "possession of methamphetamine and a hypodermic syringe."

On March 28, 2011, defendant was charged in Tehama County case No. NCR81370 (case No. 81370) with transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a))

and possessing drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)). It was further alleged defendant was previously convicted of a strike offense (Pen. Code, § 1170.12, subds. (a)-(d), 667 subds. (b)-(i)) and a controlled substance offense (Health & Saf. Code, § 11370.2, subd. (c)).

On April 18, 2011, defendant admitted his probation violations in case No. 80429 and the matter was sent to probation for a sentencing report and to drug court for an eligibility determination. On May 11, 2011, he was "accepted" into the drug court program.

On May 16, 2011, defendant pleaded guilty to transportation of a controlled substance in Tehama County case No. 81370 and admitted the prior strike allegation. In exchange for his plea, the remaining count and enhancement allegation were dismissed. Defendant was referred to probation for sentencing and to drug court for their consideration, though drug court was not a term of the plea agreement.

At sentencing on June 27, 2011, the trial court found defendant ineligible for drug court because of defendant's prior strike conviction. Accordingly, the trial court sentenced defendant in Tehama County case No. 81370 to the middle term of two years, doubled for the prior strike conviction, and a consecutive term of eight months in Tehama County case No. 80429.

Defendant appeals with a certificate of probable cause.

DISCUSSION

I

Timeliness

The People contend defendant's appeal is "untimely" because defendant did not appeal from the order imposing probation in case No. 80429, nor did he appeal from the order revoking probation in case No. 80429. Defendant is not challenging the terms and conditions of his probation. Thus, his failure to file an appeal from the order of probation is not fatal to his claim here.

Additionally, we cannot discern on this record whether the order revoking defendant's probation in case No. 80429 was, in fact, an appealable order. "Where, . . . , imposition of judgment is suspended and probation granted and later revoked the order revoking probation is not appealable, but the judgment imposing sentence, which follows upon revocation is appealable." (*People v. Smith* (1970) 12 Cal.App.3d 621, 623-624 (*Smith*).) When, however, "judgment is pronounced, its execution suspended, and probation is granted," an order revoking probation is appealable because it is "'an order made after judgment.'" (*Id.* at p. 624, fn. 1; Pen. Code, § 1237, subd. (b).)

On this record we cannot discern whether judgment was pronounced or suspended at the time probation was granted in case No. 80429. With no evidence to the contrary, we will construe the notice of appeal as being timely. (See Cal. Rules of Court, rule 8.100(a)(2).)

II

Sufficient Evidence to Revoke Defendant's Probation in Case No. 80429

Defendant contends that although he admitted to committing the acts alleged in the petition to revoke his probation in case No. 80429, and acknowledged that in doing so he would be admitting to a violation of his probation, "the trial court was in error when it revoked [his] probation without evidence that [he] had violated a condition which had actually been ordered."

In *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, the juvenile court found the minor violated his probation by leaving the custody of a custodian, and asserted jurisdiction over him pursuant to Welfare and Institutions Code section 777. (*Id.* at pp. 1082-1083.) Following disposition, the minor appealed the jurisdictional finding and argued there was insufficient evidence before the juvenile court to support such a finding. (*Id.* at p. 1083.) The Court of Appeal agreed and reversed the juvenile court's order. (*Id.* at pp. 1085 & 1091.)

In reaching its decision, the Court of Appeal noted that "aside from [the minor's] admission that he 'departed from the company of a custodian,' there was *no* evidence before the court at the jurisdictional hearing." (*In re Ronnie P., supra,* 10 Cal.App.4th at p. 1084.) Indeed, the Court of Appeal found "there [was] no indication that [the minor] had ever been ordered to remain in the custody of Positive Transitions or of the person whose company he left. In the absence of such

evidence 'it cannot be said that, as a factual matter, the minor violated a court order.' [Citation.]" (*Ibid.*)

In *Smith, supra,* 12 Cal.App.3d 621, the defendant failed to appear for his probation revocation hearing. (*Id.* at pp. 624-625.) Accordingly, the matter was submitted on the probation officer's report and defendant's probation was revoked. (*Id.* at pp. 624, 626-627.) On appeal, defendant argued, among other things, that the probation report did not allege a specific violation of the terms of probation. (*Id.* at p. 626.) The Court of Appeal agreed. (*Id.* at p. 628.)

In reaching its decision, the court found there was a single term of probation at issue: "'(1) That defendant obey all laws and all lawful directives of the Probation Officer.'" (*Smith, supra,* 12 Cal.App.3d at p. 627.) The court also noted that the probation officer's report, which was the only evidence before the trial court, indicated the defendant had fallen behind on his child support payments, failed to appear at a support hearing, and was no longer in contact with his probation officer after he relocated to Alameda County. (*Ibid.*)

The Court of Appeal found this evidence was insufficient to find defendant in violation of his probation because the order of probation did not "order [the defendant] to support his child or to report to the probation officer at regular intervals, or otherwise. . . ." (*Smith, supra,* 12 Cal.App.3d at p. 627.) There also was nothing in the record "from which the court could find that [defendant] was ever directed by the probation officer to report to him or to the Alameda County Probation Department."

(*Id.* at pp. 627-628.) Moreover, the Court of Appeal found the statements alleging the defendant's failure to pay child support or appear at a support hearing to be "rank hearsay," and not an allegation of a "fact" that he violated his probation. (*Id.* at p. 628.)

Accordingly, the Court of Appeal concluded there were no "*facts*" before the trial court "from which it could validly find that [the defendant] violated the terms of his probation." (*Smith, supra,* 12 Cal.App.3d at p. 628.)

The circumstances here are materially different than those in either *In re Ronnie P.* or *Smith*. Here, there is more than enough evidence in the record from which we can find the terms of probation allegedly violated by defendant were, in fact, ordered by the court as terms of his probation.

At the time probation was granted, the court referred to the terms of probation generally, asked the defendant if he reviewed them, understood them, and would comply. Defendant responded affirmatively to each question. In the petition to revoke defendant's probation, the department referred to the conditions allegedly violated by number (i.e. Term 3, Term 6, Term 18) as well as description. The numerical identification of these terms is persuasive evidence that the department was referring to numbered paragraphs in a probation order containing these terms that is not part of the record on appeal.

That there was a probation order containing these conditions, which was known to defendant, is further supported by the record of his admission to violating the probation order.

At that hearing, defendant admitted not only to committing the acts that formed the basis for the violations, he acknowledged that by committing those acts he was violating his probation. Defendant had two attorneys at that hearing and neither argued defendant was admitting to probation violations that were never ordered. There is persuasive evidence that, in fact, the terms were ordered. Accordingly, we find no error.

III

Defendant Was Properly Sentenced

Defendant further contends that in sentencing him to prison, the trial court failed to comply with Penal Code section 1210.1, which requires that any person convicted of a "nonviolent drug possession offense," be placed on Proposition 36 probation. We find no error.

We note that in *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, the First Appellate District affirmed an injunction against the enforcement of Penal Code section 1210.1 in its present form until it is submitted as a referendum to the electorate. We therefore continue to cite to the provisions of the prior version. (Stats. 2001, ch. 721, § 3, p. 5616; *People v. Enriquez* (2008) 160 Cal.App.4th 230, 240, fn. 2.)

In case No. 81370 defendant was convicted of transporting a controlled substance. Transporting a controlled substance is not a "nonviolent drug possession offense" unless the defendant has proved he transported the drugs for personal use. (Pen. Code, § 1210, subd. (a); *People v. Barasa* (2002) 103 Cal.App.4th 287, 295-297.) Here, defendant has not proved that he was

transporting the controlled substance for personal use. Defendant told his probation officer the drugs were his, and the probation officer concluded the drugs were for defendant's personal use, but the issue was never raised at sentencing and the court made no finding the drugs were for defendant's personal use. Absent such a finding, defendant was not eligible for Proposition 36 probation in case No. 81370.

Because the court acted within its discretion and sentenced defendant to prison in case No. 81370, defendant "was thus not amenable to drug treatment within the meaning of [Penal Code section 1210.1]." (*People v. Wandick* (2004) 115 Cal.App.4th 131, 135, citing *People v. Esparza* (2003) 107 Cal.App.4th 691, 699.) In prison defendant would be "unavailable to participate in the specified treatment programs." (*Wandick*, at p. 135; see also *Esparza*, at p. 699.) Thus, it was not error to refuse defendant Proposition 36 probation in case No. 80429.

IV

Ineffective Assistance of Counsel

Defendant further contends he received ineffective assistance of counsel at sentencing. "'"[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus

proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In this case, defendant had two attorneys representing him at sentencing, neither objected to the sentence imposed and neither offered any explanation for their silence. Counsel also offered no explanation for the pleas negotiated, the decision to request drug court, or why defendant was not asking for Proposition 36 probation. Thus, defendant's claim that trial counsel was ineffective for failing to object to the prison sentence imposed, is better asserted in habeas corpus proceedings. (See *People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

RAYE, P. J.

ROBIE, J.